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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 288

JACK EUGENE THOMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried, without a jury, convicted, and sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 7–8) on a one-count indictment, returned in the District Court for the Southern District of California, charging that he knowingly and unlawfully failed, as required, to report for induction into the armed forces of the United States (R. 2–3).

Petitioner's defense was that the draft board had improperly denied him classification as a

conscientious objector (R. 55, *et seq.*). However, after full inquiry into the matter, including examination of petitioner's selective service file (R. 24–46, 47–55) and consideration of the testimony of the chairman of petitioner's draft board (R. 23, 46, 52–55) and of petitioner (R. 55–65), the trial judge stated (R. 66, 67–68):

> * * * In the hearing here they inquired into all his background, his neighbors, friends, high school associates, his personal beliefs, conversations at dinner tables and his foreman, and they inquired from everyone who would ordinarily have expressed to them a man's views, what this man's views were, to see what his religious beliefs were. And they came to the conclusion that his belief was not based on religious training and belief.
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> * * * I cannot say that the local board or the appeal board acted arbitrarily or capriciously. I think that they extended a complete opportunity to the defendant here to be heard, that they did hear him, that they took everything into consideration and did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible, or any other book which espouses religious views or beliefs, but that they took into consideration everything that he had to offer, as well as his conduct,

> and life in the past, and his general attitudes as expressed by his conduct. * * *

Thus, the evidence before the draft board and the trial court below, confirmed by the report of a special hearing officer (R. 33–44) assigned to inquire into petitioner's claim for exemption as a conscientious objector, showed, for example, that neither he nor his parents, from whom he claimed to have obtained his views of war, were affiliated with any religious or other organization espousing such beliefs (R. 33, 56–58); that he knew little of the Bible (R. 34); that he was not interested in any social welfare work or organization, nor had he participated in any such activity while in college (R. 34); that he participated without objection or qualification in R. O. T. C. training (R. 36, 64–65); and that after reading that milkers were entitled to occupational deferments, he admittedly obtained such employment in order to secure a draft deferment (R. 26, 34–35, 64).

The circuit court of appeals, relying on the disposition of the *Balogh* case, affirmed petitioner's conviction on the ground that since he had been given his pre-induction physical examination more than 90 days before he was ordered to appear for induction and was, therefore, subject to re-examination under Army regulations, he had not exhausted his administrative remedy prior to his failure to report for induction and, consequently, could not challenge the action of

the draft board in the criminal prosecution (R. 76–80). Petitioner here contends that the Army regulation relied upon by the court below could not modify or affect the selective service processes, that he had exhausted his administrative remedy, since the controlling authority, the Selective Service System, had found him acceptable for service, and that therefore, he was entitled in the trial court to challenge the propriety of the denial to him of a conscientious objector's classification (Pet. 10–16).

The short answer to petitioner, which the court below might well have relied upon, is that the trial court, over the government's objection, did permit full inquiry into the basis of petitioner's classification (see, e. g., R. 52–53) and found that the draft board had fully and fairly considered petitioner's claim for exemption, and that its determination was not arbitrary or capricious. Even assuming that petitioner was entitled in the criminal proceeding to a review of the draft board's action, the convicting court gave the matter all the consideration to which petitioner was entitled. See *Estep* v. *United States,* 327 U. S. 114, 122; *Cahoon* v. *United States,* 155 F. 2d 150 (C. C. A. 5), certiorari denied, 329 U. S. 739, rehearing denied, 329 U. S. 833. However, as the court below concluded, the matter is disposed of by the controling action of this Court in *United States* v. *Balogh,* 329 U. S. 692.

In the *Balogh* case, a conviction for failure to report for induction was reversed by the Second Circuit on the ground that consideration by the classifying boards of an advisory recommendation of a theological panel invalidated the registrant's final classification. 157 F. 2d 939. The Government filed a petition for a writ of certiorari challenging that decision on the ground that, by failing to report to the induction station for his final physical examination (which was required under Army regulations for the same reason as in the instant case), petitioner had failed to exhaust his administrative remedy and he therefore was not entitled to challenge the legality of his classification in the criminal proceeding. By *per curiam* decision, citing *Falbo* v. *United States,* 320 U. S. 549, this Court granted certiorari, vacated the judgment, and remanded the case to the circuit court of appeals. 329 U. S. 692. Thereafter, the Second Circuit concluded, as did the court below here under identical circumstances, that by reason of the Army regulation, the registrant had not exhausted his administrative remedies. 160 F. 2d 999. On June 2, 1947, this Court denied Balogh's petition for a writ of certiorari. No. 1342, O. T. 1946. This Court has also denied certiorari in other similar cases. See *Cahoon* v. *United States,* certiorari denied, 329 U. S. 739, rehearing denied, 329 U. S. 833; *Hudson* v. *United States,* certiorari denied, 329 U. S. 813; *Garland* v. *United States*

and *Wells* v. *United States,* certiorari denied March 3, 1947, Nos. 911 and 916, O. T. 1946.

Since the question and contentions here presented are no different than those fully considered in the *Balogh* case and others cited, the decision below is clearly correct. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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